

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THOMAS WAYNE POWELL,
Plaintiff-Appellant,

and

BARBARA JOHNSON POWELL; MARKETA
ROCHELLE BROWN, an infant by and
through Thomas and Barbara
Powell, next friends and guardians,
Plaintiffs,

v.

W. J. WILBORN, Individually,
Defendant-Appellee.

No. 00-2086

Appeal from the United States District Court
for the Western District of Virginia, at Danville.
Jackson L. Kiser, Senior District Judge.
(CA-99-47-4)

Submitted: April 6, 2001

Decided: April 25, 2001

Before WIDENER, NIEMEYER, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Beverly D. Crawford, Richmond, Virginia, for Appellant. Mark L. Earley, Attorney General, Judith Williams Jagdmann, Deputy Attor-

ney General, Gregory E. Lucyk, Senior Deputy Attorney General, Edward M. Macon, Senior Deputy Attorney General, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Thomas Wayne Powell appeals the district court's evidentiary rulings admitting expert testimony of a forensic toxicologist in his civil rights action under 42 U.S.C.A. § 1983 (West 2000) alleging use of excessive force. The jury returned a verdict for the Defendant, and the district court entered judgment accordingly. We review evidentiary rulings for abuse of discretion. *See United States v. Bostian*, 59 F.3d 474, 480 (4th Cir. 1995). We review arguments made in the first instance on appeal for plain error. *See United States v. Castner*, 50 F.3d 1267, 1277 (4th Cir. 1995). We find no reversible error, therefore, we affirm.

Powell was stopped by Virginia State Police Officer Wilborn for repeatedly driving his vehicle across the center line. Powell admitted to having ingested alcohol and prescription drugs. The parties disagree on the nature of Powell's behavior. Powell asserts he was passive and compliant; Wilborn asserts Powell was verbally abusive and resisted arrest. It is undisputed that Officer Wilborn sprayed pepper spray on Powell's face. Powell asserts he was sprayed five times, however, while Wilborn asserts he was sprayed twice.

At trial, Wilborn introduced testimony of a forensic toxicologist concerning the level of alcohol in Powell's blood and the possible behavioral effects of the ingestion of alcohol and prescription drugs. Powell moved in limine to limit the testimony, arguing that it was not relevant based on *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579

(1993), and objected to the testimony of the effect of Powell's prescription medicine because the witness was not a medical doctor. Both the motion and objection were overruled.

Powell appeals these rulings, adding the additional claim that his blood alcohol concentration was previously adjudicated, therefore, re-adjudication here is barred by collateral estoppel. We have reviewed the record and find no abuse of discretion or plain error. We therefore affirm the judgment of the district court. *See Powell v. Wilborn*, No. CA-99-47-4 (W.D. Va. July 20, 2000). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED